No. 4626.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John G. Moran,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error,
Joseph Bruno and W. E. Smith,
Defendants.

BRIEF OF DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

The United States of America, defendant in error, filed a complaint in the United States District Court for the Southern District of California to recover ten thousand dollars ($10,000) damages and costs for breach of a contract in the nature of a bail bond or recognizance. The general and special demurrer filed by the plaintiff in error, John G. Moran, was overruled and answer filed. The cause was regularly set for trial and the findings were in favor of the defendant in error. Judgment was entered in favor of the

defendant in error for the sum of ten thousand dollars ($10,000), and costs. The plaintiff in error sued out a writ of error to review the judgment of the lower court. The defendants Joseph Bruno and W. E. Smith have never been served with process and are not parties to this appeal.

Statement of Facts.

The complaint in substance alleges that an affidavit of complaint was filed before the United States Commissioner at Los Angeles, California, on July 5, 1923, charging Joseph Bruno with having violated section 217 of the Federal Penal Code by mailing narcotics in the United States mails, the said offense having been committed at Los Angeles, California, on or about June 27, 1923; that Bruno was arrested upon a warrant of arrest duly issued upon the said affidavit of complaint, was brought before the United States Commissioner and duly admitted to bail in the sum of ten thousand dollars ($10,000), pending examination on said charge; that to secure the release of Bruno from the custody of the United States Marshal on said charge, Joseph Bruno, principal, and plaintiff in error, and W. E. Smith as sureties, executed a bail bond before the United States Commissioner, a copy of which is attached to the bill of complaint and marked Exhibit "A"; that in consideration of the execution of Exhibit "A" Bruno was released from the custody of the United States Marshal into the custody of the sureties; that the cause was regularly set for hearing November 13, 1923, after notice to the sureties, and that upon

the failure of Joseph Bruno to appear and upon failure of the sureties to produce him, the Commissioner declared the bond forfeited.

It appears from an endorsement on the bail bond that it was filed before and with the said United States Commissioner July 6, 1923, and was thereafter filed with the clerk of the United States District Court for the Southern District of California. [Tr. p. 10.]

The demurrer filed by plaintiff in error is general and special and attacks the validity of the bail bond and complaint.

The answer likewise challenges the sufficiency of the complaint and bail bond but admits the arrest of Bruno on the date alleged in the complaint, admits that Bruno was brought before the said Commissioner on a criminal charge, admits that Bruno was admitted to bail in the sum of ten thousand dollars ($10,000), pending examination on said charge, and admits the execution by plaintiff in error of Exhibit "A" attached to the complaint of the defendant in error; admtis that Bruno was released from the custody of the marshal. The answer alleges that Bruno was arraigned on the complaint and the cause set for hearing July 31, 1923. The answer alleges that certain continuances were had and that the cause was continued without the consent of plaintiff in error and that plaintiff in error had no notice that the said cause was set for hearing November 13, 1923.

The court found that these allegations of the answer were untrue and found to the contrary that the cause was continued with the knowledge and consent of

plaintiff in error to November 13, 1923, and that plaintiff in error was notified that the cause was set for hearing on such date. [Tr. p. 23.]

Issues.

Plaintiff in error contends that the court erred in overruling the demurrer. In support of this contention he urges, first, that the bail bond is invalid, and second, that the complaint is insufficient.

We shall consider these contentions of plaintiff in error in the order advanced by him in his brief.

I.

The Bail Bond Is Valid for the Reason That It Sufficiently States the Nature of the Offense.

Section 1014 of the Revised Statutes provides in part that

> "the offender may * * * agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed."

Section 914 of the Revised Statutes provides in part,

> "the practice, pleadings, and forms and modes of proceeding in civil causes * * * in the * * * district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such * * * district courts are held."

The term "mode of process" in section 1014, R. S. *supra,* means "mode of proceeding." (U. S. v. Zara-

finitis, 150 Fed. 97, C. C. A. 5.) (U. S. v. Dunbar, 83 Fed. 153.) The term "modes of proceeding" used in section 914, R. S. *supra,* is used in distinction to the word "forms", but the word "forms" is not used in the former section. While these two statutes are dissimilar in that one applies to civil causes and the other to criminal causes, they are nevertheless both in the nature of conformity statutes intended to assimilate proceedings in the district courts to the proceedings had in the state court in which the district court is held, with the limitation that the proceedings shall conform only insofar as district courts shall conform them. Comparison of these two statutes is valuable as illustrating that Congress did not intend that the *form* of bail in the federal court should absolutely and entirely conform to the *form* of bail in the state courts, for otherwise the term "form" would have been used in Revised Statutes, section 1014.

As pointed out by this court in the case of the United States v. Dunbar, 83 Fed. 153, the provisions of the Oregon Statute concerning bail are similar to the provisions of the common law. The provisions of the California Penal Code concerning bail are similar to the provisions of the Oregon Statute and are of value as stating the common law. A bail bond in the federal courts in California is tested by the provisions of the Statutes of California only because the California Statute is declaratory of the common law, and this test applies only insofar as the federal courts apply it.

Section 1278 of the Penal Code of California provides that bail "may be substantially in the following form." A substantial description of the general nature of the offense charged is required to be set forth in the bail bond for the purpose of identifying the case with some case in which an indictment, information, or complaint has been filed. (3 California Jurisprudence 1062.)

In the case of United States v. Sauer, 73 Fed. 671, the court said:

> "To answer to a charge of felony would be sufficiently explicit because for a felony an indictment would lie."

In 6 C. J. 998, the following rule is given:

> "In federal cases a sufficient specification of the charge is that the accused appear to answer such matters and things as have or shall be objected against him."
>
> U. S. v. Graner, 155 Fed. 679;
> Kirk v. U. S. 137 Fed. 753, Aff. 204 U. S. 668.

In the instant case the complaint alleges, and the court found, that Joseph Bruno was charged with a "violation of section 217 of the Federal Penal Code, committed on or about the 27th day of June, 1923, to-wit: In the Los Angeles, California District aforesaid," and the bail further recites:

"Now, therefore, if the said Joseph Bruno shall appear and answer said charge, or any matter or thing that may be objected against him." [Tr. p. 8.]

A violation of section 217 of the Federal Penal Code is an offense against the United States and a crime. It is a violation of that section to mail poisons in the United States mails and narcotics are poisons.

Plaintiff in error when he signed the bail bond had notice of the Statute of the United States which was alleged to have been violated and, as he alleges in his answer, produced Bruno for hearing before the Commissioner on the charge. While the bail might have been more specific and might have set out in detail the full description of the offense charged, it is submitted that the bail sufficiently conforms to the requirements of the law and that plaintiff in error has not been injured.

If the description of the offense in the bail were insufficient the reference to the affidavit of complaint would cure the defect, for it would give the surety notice and he could, from an examination of the complaint, fully ascertain the gravity of the offense charged. (Commonwealth v. Merrian, 7 Allen (Mass.) 356.)

If, as stated in the *Sauer* case, *supra,* a statement that the offense is a felony, is sufficient, and if, as the authorities above cited hold, the description of the offense is required simply for the purpose of identifying the case, then surely a bail bond which recites the time and place of the commission of the offense and recites that a particular section of the Federal Penal Code has been violated, and which refers to the criminal pleading which contains the charge upon which the warrant of arrest has been issued, is sufficient.

II.

The Bail Bond Is Valid for the Reason That It Contains an Acknowledgment of Indebtedness and a Promise to Pay the Debt.

The contention of plaintiff in error that the bail contains no promise to pay, is technical, unreasonable and not in accordance with law, or the provisions of the bail.

In the case of Dunbar v. U. S., 83 Fed. 153, cited by plaintiff in error, the bail provided, "We owe to the United States government." Plaintiff in error concedes that this is sufficient and such is the law. The bail in the instant case contains a clear acknowledgment of the debt and a promise to pay the same within the holding of the *Dunbar* case.

The bail (Exhibit "A") recites:

"That we Joseph Bruno as principal, and John G. Moran and W. E. Smith as sureties, are held and firmly bound unto the United States of America, in the sum of ten thousand dollars, to the payment of which, well and truly to be made, we jointly and severally bind ourselves, our executors and administrators, firmly by these presents."

The term "held and firmly bound" was contained in the bail filed in the case of Shattuck v. People, 5 Ill. 477, 480. The court in holding this expression to be equivalent to "owes and is indebted", said:

> "The obligation in question, though not technically, is substantially in the form of the common law recognizance. In one the party acknowl-

> edges that he is held and firmly bound to pay. In the other, that he owes and is indebted. This language, though variant in form, has the same force and meaning."

In the case of Douglas v. Hennesy, 15 R. I., 272, 282, the court held that the expression, "to which payment well and truly to be made I bind myself", contained in a condition of defeasance sufficiently imported a promise to support an action of covenant.

"An acknowledgment of a person that he is bound to pay is equivalent to a promise to pay." Milner v. Bainton, 1 Del. 144.

The bail in the instant case, as above quoted, plainly and specifically acknowledges an existent and continuing indebtedness of plaintiff in error to the United States in the sum of ten thousand dollars ($10,000), and contains a promise to pay that indebtedness if any of the conditions therein are not complied with, for the bail recites: "Then shall this recognizance be void, otherwise to remain in full effect and virtue." The conditions of the bail bond have not been complied with and it is, therefore, not void but is in full force and effect.

III.

The Bail Sufficiently Describes the Place Where the Accused Is to Appear.

The bail in the instant case contains the following endorsement: "United States District Court, Southern District of California, before United States Commissioner." [Tr. p. 10.]

The bail recites that Bruno, * * * "pending examination has been duly admitted to bail in the sum of ten thousand dollars. Now, therefore, if the said Joseph Bruno shall appear and answer said charge or any matter, or thing that may be objected against him wherever and whenever the same may be prosecuted, * * *." This is as definite as section 1278 of the Penal Code of California, which provides in part:

> "Hereby undertake that the above named will appear and answer the charge above mentioned in whatever court it may be prosecuted."

In People v. Carpenter, 7 Cal. 402, it was held that a bail bond need not state in what court the defendant shall appear as the law provides in what court he shall be tried.

The reason for requiring the bail to specify some place for appearance is to disclose a court having jurisdiction of the offense and to give notice where the accused is to appear. In the present case the accused was to appear before the Commissioner for examination upon the charge contained in the affidavit of complaint filed against him. If he and the sureties knew before what tribunal he was to appear they were not prejudiced. That they did have such knowledge and notice is disclosed on page 23 of the Transcript of Record in this case, where the court found.

"That on July 6, 1923, upon the arraignment of the defendant Joseph Bruno, and the execution of the bond by these defendants, the court, in the presence of the defendants continued the preliminary of the defendant Joseph Bruno until July 31st, which said

continuance was with the express consent of the defendants; that upon July 31st, the hearing was, in the presence of the defendant continued to September 4th at the request of the plaintiff and defendant Joseph Bruno; that on September 4th, 1923, the cause was continued with the consent of both parties and set for hearing on September 20th, 1923; that on September 20th, 1923, the cause was in like manner continued to September 27th, 1923; that on September 27th, the cause was in like manner continued until October 11th, 1923; that on October 11th, 1923, the cause was continued to October 22nd, 1923, for hearing, at the request of the bondsmen John G. Moran and W. E. Smith, upon the statement by them that the defendant Joseph Bruno was ill in a hospital; that on October 22, 1923, the cause was continued for hearing to October 29th, 1923, at the request of Arthur Chapman, attorney for the defendant; that on October 29th, 1923, the cause was continued one week, the attorney for the defendant being present, but the defendant Joseph Bruno being absent; that thereafter the cause was in like manner continued until November 13th, 1923, at which said time the defendant Joseph Bruno was called by the Marshal and the defendants John G. Moran and W. E. Smith were by the Marshal called to produce the body of the said Joseph Bruno; that the defendants failed to appear and it was by the Commissioner ordered that his bond be forfeited."

In the *Dunbar* case the court said:

> "The failure of the sureties to produce their principal for trial when called upon to do so at the time regularly set for trial, was sufficient notice to them. No other notice was required."

It is undisputed in this case that the United States Commissioner at Los Angeles, California, had jurisdiction to conduct the examination of Bruno upon the charge contained in the affidavit of complaint. It is undisputed that plaintiff in error was notified at all times that the proceedings were to be held before the United States Commissioner at Los Angeles, California, and the undisputed finding of the court to the effect that plaintiff in error was notified to produce the accused before him on a day certain are sufficient answer to this contention of plaintiff in error.

The Complaint States a Cause of Action.

Paragraph 5 of the complaint [Tr. p. 6], and the above quoted findings of the court are sufficient answer to plaintiff's contention that plaintiff in error was not notified of the time and place for the appearance of the accused. Plaintiff in error was sufficiently notified of these facts within the above quoted rule of the *Dunbar* case.

We respectfully invite the attention of the court to the findings of the court and to the complaint filed herein, and respectfully urge that they are sufficient answer to the contention set forth on page 16 of the Opening Brief of plaintiff in error to the effect that the Commissioner did not call the cause for hearing, or that the accused was not called to appear and answer the charge against him.

IV.

Plaintiff in error states, but does not argue, that it is not alleged that judgment was entered upon the forfeiture. The complaint does allege that the Com-

missioner declared the bond to be forfeited. [Tr. p. 6.] The proceeding from which plaintiff in error is now appealing is one to reduce this forfeiture to an absolute judgment.

V.

It appears from the bail, which is a part of the complaint, and Exhibit "A" thereof, that it was first filed in the Commissioner's court and thereafter in the District Court. [Tr. p. 10.] In the case of Mendicino County v. Lamar, 30 Cal. 629, it appears that no such endorsement was on the bond and that case is, therefore, by inference, authority for the validity of the bail bond in the instant case.

Conclusion.

For the reasons hereinabove set forth the ruling of the court in overruling the demurrer was proper and the court properly held the complaint and bond to be sufficient for the reason that the bail bond substantially conformed to the requirements of the common law and of the state of California by stating the nature of the offense sufficiently to identify the case, properly held that the bail bond contained an acknowledgment of indebtedness and a promise to pay, and properly held that the bail bond sufficiently designated the time and place for the appearance of the accused.

It is respectfully submitted that the judgment of the District Court should be affirmed.

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